

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 00-11623-RWZ

MARINA BAY REALTY TRUST LLC, *et al.*

v.

UNITED STATES OF AMERICA, *et al.*

MEMORANDUM OF DECISION AND ORDER

May 27, 2004

ZOBEL, D.J.

In the late 1990s, plaintiffs Marina Bay Realty Trust LLC, Neponset Circle Skilled Nursing and Rehabilitation Center II, Inc., and Gordon Development Group, Inc., sought to build a nursing home on property in the Marina Bay area of Quincy, Massachusetts. After buying the property, plaintiffs discovered that the soil had been contaminated with fuel oil from underground storage tanks that had been buried on the premises five decades earlier, when the land was part of a United States Naval Air Station. Seeking to recover remediation costs, plaintiffs have sued the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b)(1) & 2671-80, for negligence and for violating Massachusetts General Laws Chapter 21E. On January 5, 2004, a bench trial commenced; and, over the course of five days, plaintiffs presented their entire case-in-chief except for one expert witness. At the end of the fifth day of trial, the United States filed a Motion for Judgment on Partial Findings pursuant to Federal Rule of Civil Procedure 52(c).

The Motion contends that (1) plaintiffs have failed to prove negligence and (2) the

FTCA does not waive sovereign immunity for claims under Massachusetts General Laws Chapter 21E. In their opposition, plaintiffs appear to concede that they have not proven negligence. Instead, plaintiffs argue that the violation of Chapter 21E constitutes a “wrongful act or omission” within the FTCA’s purview, 28 U.S.C. § 1346(b)(1). Under Chapter 21E, § 5(a)(5), “any person who . . . caused or is legally responsible for a release or threat of release of oil or hazardous material from a vessel or site, shall be liable, without regard to fault” The Supreme Judicial Court has held that the requirement of causation constitutes something more than strict liability. See, e.g., Marengi v. Mobil Oil Corp., 624 N.E.2d 561, 563 (Mass. 1993). But liability under Chapter 21E is “without regard to fault” and simply does not require a “wrongful act or omission” that is a necessary prerequisite to the FTCA’s waiver of sovereign immunity. See Dalehite v. United States, 346 U.S. 15, 45 (1953) (“[T]he Act does require some brand of misfeasance or nonfeasance, and so could not extend to liability without fault.”). Where, as here, there has been no showing of negligence or other tortious conduct,¹ plaintiffs’ claims under Chapter 21E are barred.

Accordingly, the Motion for Judgment on Partial Findings is allowed. Judgment may be entered for defendant United States of America.

DATE

/s/ Rya W. Zobel

RYA W. ZOBEL

UNITED STATES DISTRICT JUDGE

¹ According to plaintiffs, their one witness who has not testified, Dr. Warren Rogers, “is expected to testify that the Government caused the contamination in question,” but his expert report does not comment on the applicable standard of care when the underground storage tanks were installed in the 1940s.